IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 14, 2006 Session

THOMAS ALAN COOK v. SHERRI ANNETTE COOK

Appeal from the Chancery Court for Robertson County
No. 15890 Laurence M. McMillan, Jr., Chancellor

No. M2005-02725-COA-R3-CV - Filed on February 1, 2007

The mother of the parties' only child filed this post-divorce petition seeking to modify the Permanent Parenting Plan and Child Support set forth in the 2001 Final Decree of Divorce. She contends the child support award in the 2001 Final Decree of Divorce is void as against public policy because she was required to pay child support although she was the custodial parent. She requested a modification of the child support retroactive to the date of the divorce and a judgment for the arrearage. The trial court found the child support award in the Final Decree was not void, granted the mother's petition to modify child support prospectively, and ordered the father to pay $474 per month, the presumptive child support pursuant to the guidelines. We affirm.

Tenn. R. App. P. 3; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Lee Borthick, Springfield, Tennessee, for the appellant, Sherri Annette Cook.

Christine Brasher, Springfield, Tennessee, for the appellee, Thomas Alan Cook.

OPINION

Thomas Cook and Sherri Cook, the parents of one minor child, were divorced pursuant to a Final Decree of Divorce entered April 10, 2001. Father was represented by counsel at all times leading up to the 2001 divorce. Mother was *pro se*. The terms and conditions of the parties' Marital Dissolution Agreement and Permanent Parenting Plan, which were incorporated into the Final Decree, were entered into by agreement and neither party appealed. Although the 2001 Final Decree of Divorce is at the center of this controversy, neither the 2001 Final Decree, the Permanent Parenting Plan nor the Marital Dissolution Agreement are in the appellate record. Accordingly, our knowledge of the content of these most relevant documents is limited to the parties' inconsistent, if not contradictory, characterizations thereof and the few exact references thereto in the 2005 proceedings.

It appears from the incomplete record and the briefs of the parties that the parents were awarded "joint residential care of the minor child," and pursuant to the 2001 Permanent Parenting Plan Mother was to have care of the child during the school week and Father had every weekend.[1] It is undisputed that Mother has had primary custody of the child ever since the 2001 divorce and that Father, who had the right to have the child every weekend, only exercised visitation every other weekend. It is also undisputed that the 2001 decree required that Mother pay Father $400 per month in child support and the private school tuition for the child to attend White House Christian Academy.

Within months after the 2001 Final Decree was entered, the parents reached an "agreement" to modify their respective parenting responsibilities. The parents's so-called agreement, however, was never presented for court approval. Accordingly, the 2001 Permanent Parenting Plan, which is not in the appellate record, remained in effect.

Four and one-half years later, in February of 2005, Mother filed the petition at issue, seeking *inter alia* an award for necessities retroactive to the 2001 divorce, and modification of child support.[2] In pertinent part, the Amended Petition reads:

> The Respondent has a duty to provide for the care of his minor child. This duty has been ignored. The Petitioner should be awarded a judgment of $709 per month, for the time period since April 10, 2001, as a child support arrearage; or in the alternative, an award of $709 per month for necessities provided to the minor child since April 10, 2001. This amount would total $32,614 as of February 10, 2005.

Mother also sought to have the 2001 child support decree and permanent parenting plan declared void as against public policy because Mother "became the primary residential parent by agreement with [Father]." Father filed an Answer denying any financial obligations to Mother, contending "the parties were awarded joint residential care of the minor child" and that she was the one who owed child support pursuant to the 2001 Decree. He also filed a Counter-Petition seeking custody of the child plus an award of a child support arrearage.

Prior to the hearing on Mother's Amended Petition and Father's Counter-Petition, the parties agreed to a new Parenting Plan, pursuant to which Mother would be the primary residential parent and Father would pay Mother child support in the amount of $474 per month. The parties did not

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[1] We garner these "facts" from the second paragraph in Father 's Counter-Petition filed on May 2, 2005, which Mother admitted in her Answer filed on June 1, 2005. To add to the confusion, Mother's original Petition asserted that Father "was granted custody of the minor child," but the Amended Petition stated this was incorrect. As paragraph one of the Amended Petition explains, "Petitioner's counsel prepared said Petition after meeting with Petitioner and being told her ex-husband was granted legal custody of the minor child, but that her ex-husband told her to take the child shortly thereafter."

[2] In the original petition Mother filed in this action, she also sought custody of the child. This was based on the mistaken belief the 2001 Final Decree awarded custody to Father. The confusion is explained more fully in footnote one.

agree, however, as to any of the retrospective issues raised in the competing petitions. Therefore, the issues that remained were whether the 2001 Permanent Parenting Plan and the child support award embodied therein were void as against public policy; whether Father or Mother owed an arrearage for child support for "necessities" dating back to the 2001 Final Decree of Divorce; and whether Mother was entitled to recover her attorney's fees.

Following an evidentiary hearing during which both parties testified, the trial court found that few facts were in dispute and that the matters at issue presented questions of law. The trial court found that the April 2001 Decree was not void and, therefore, Mother's remedies were prospective only. The trial court denied Father's Counter-Petition for an arrearage judgment based upon a finding Father was estopped as a consequence of his responses to discovery.[3] The trial court approved the parties' proposed parenting plan and Father's child support obligation of $474 per month, which the court found to be in compliance with the child support guidelines. The trial court additionally ordered that the agreed upon child support obligation of Father of $474 per month would be effective February 1, 2005, the month Mother's Petition for modification was filed.[4]

Mother appeals the "retrospective" issues, specifically contending the trial court erred in not determining the April 2001 order was void and that Father is liable for an arrearage dating back to the 2001 decree. She also contends the trial court erred by denying her claim for attorney's fees.

THE 2001 FINAL DECREE OF DIVORCE

This appeal and the challenge to the 2001 Divorce Decree arises from Mother's "Petition for Change in Custody and Award for Necessities Provided in the Absence of Child Support" in which Mother asked the court to find the prior order void as against public policy.

At the center of this controversy is Mother's contention that the 2001 Decree violates the public policy of this state that a parent is under a duty to support his or her child and may not bargain away the duty to support that child. *See Witt v. Witt*, 929 S.W.2d 360, 362 (Tenn. Ct. App. 1996); *Woodard v. Woodard*, No.M2004-01981-COA-R3-CV, 2006 WL 1343209, at * 4 (Tenn. Ct. App. May 16, 2006) (citing *Berryhill v. Rhodes*, 21 S.W.3d 188, 193 (Tenn. 2000)).[5] As part of her argument, she contends Father unlawfully bargained away his child support obligations. She relies on *Witt* which held "[A]greements, incorporated in court decrees or otherwise, which relieve a

[3] Father did not appeal this decision.

[4] Since the order was entered in December of 2005, it also set an arrearage judgment for the months of February 2005 through December 2005, payable $1000 per month until satisfied.

[5] *Berryhill* addressed the legal validity of private agreements between parents concerning child support. The private agreement in *Berryhill* was not affirmed, ratified, or incorporated into a final decree by a court. *Berryhill*, 21 S.W.3d at 191. Thus, in *Berryhill*, the validity of a prior court order was not at issue. *Berryhill* addressed *inter alia* the validity of a private agreement between the mother and father that was never approved by a court.

natural or adoptive parent of his or her obligation to provide child support are void as against public policy as established by the General Assembly."[6] *Witt*, 929 S.W.2d at 363.

Mother's petition constitutes a collateral attack against the 2001 Decree because this is not a direct appeal of the 2001 Decree.[7] *See Gentry v. Gentry*, 924 S.W.2d 678, 679 (Tenn. 1996). The issue for this Court, therefore, is whether the 2001 Final Decree of Divorce, and specifically the child support award therein, was void. *Id*. Resolution of this issue lies in the distinction between a void judgment, which is subject to collateral attack, and a voidable judgment, which is not subject to collateral attack.[8] *Id.* at 680-81.

In *Gentry*, the Executor of the Estate of Donnie Ray Gentry contested the claim by Lois Hawkins Gentry, his surviving spouse, to an elective share. The Executor contended Mr. Gentry's 1985 divorce from Judy Eades Gentry, his previous spouse and the mother of his children, was void and, therefore, the 1991 marriage to Lois Hawkins was a nullity.[9] Thus the issue in *Gentry* was whether the 1985 judgment awarding Donnie Ray Gentry and Judy Eades Gentry a divorce was void, or merely voidable. *Id.* at 680. The *Gentry* court found the divorce decree was not a void judgment and, therefore, not subject to collateral attack as being voidable.

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[6] In *Witt*, this court found an agreement between the parents void. The *Witt* agreement provided a statement by the mother that the father was not in fact the child's father, and the father signed a statement forfeiting his rights to the child. The mother further stated that she relieved the father of any parental responsibilities toward the child. Blood tests showed the father to be the actual father of the child. *Witt*, 929 S.W.2d 360. This court in *Witt* also discussed a case from Indiana wherein an unmarried woman desiring a child engaged a man to father that child after signing a release holding him harmless for all financial support for any child that might result from their relationship. *Witt*, 929 S.W.2d at 363 (citing *Straub v. Todd*, 626 N.E.2d 848 (Ind. App. 1994)). In both cases the parents' efforts to relieve themselves of complete responsibility towards the child were found contrary to public policy.

[7] If an action is brought for the purpose of overturning a final judgment, it is a direct attack upon it. If the action has an independent purpose, if it contemplates other relief or another result, although the overturning of the judgment may be important or necessary to its success, then the attack upon the judgment is collateral. *See Turner v. Bell*, 279 S.W.2d 71, 75 (Tenn. 1955) (quoting *Jordan v. Jordan*, 239 S.W. 423, 445 (Tenn. 1922)).

[8] The distinction between void and voidable is explained in GIBSON'S SUITS IN CHANCERY, as follows:

> A decree is absolutely void if it appears on the face of the record itself either that the Court had no general jurisdiction of the subject matter, or that the decree is wholly outside of the pleadings, and no consent thereto appears.
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> . . .
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> All decrees not thus appearing on their face to be void are absolutely proof against collateral attack, and no parol proof is admissible on such an attack to show any defect in the proceedings, or in the decree.

WILLIAM H. INMAN, GIBSON'S SUITS IN CHANCERY § 228, at 219-20 (7th ed. 1988).

[9] The basis of the argument was the parties had not waited 90 days to obtain the divorce as Tenn. Code Ann. § 36-4-103(c) required.

> Tested by the standard for a void judgment, the divorce decree in this case is not subject to collateral attack. The court obviously had general jurisdiction of the subject matter, a suit for divorce; the decree awarding the divorce was not outside the pleadings, it was the specific relief sought; and, the court had jurisdiction of the parties, both of whom appeared in person and by pleadings. The conclusion that Section 36-4-103(c) mandates that a complaint for divorce be on file 90 days before being heard, does not mean necessarily that a decree entered upon a hearing held less than 90 days subsequent to the filing is void. Failure to comply with the 90 day requirement does not render the decree "wholly outside of the pleadings." *Gibson's Suits in Chancery*, § 228 at 219. Since the decree is not void, it is either voidable or valid, *Gibson's Suits in Chancery* § 193, at 194 and, in either event, cannot be reversed through a collateral attack by the children of the parties to the divorce suit.
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> The few Tennessee cases involving similar attacks on divorce decrees support this conclusion that a divorce decree is void and subject to collateral attack only where the trial court lacks general jurisdiction of the subject matter, rules on an issue wholly outside of the pleadings, or lacks jurisdiction over the party complaining. In *Page v. Turcott*, 167 S.W.2d 350 (Tenn. 1943), the issue was whether the judgment was void because it decided a matter outside of the pleadings. In that case, heirs challenged the deceased's marriage on the ground that a prior divorce was void because the complaint did not set forth with reasonable certainty facts which would show that the claims of abandonment and non-support were willful, and because the appointment of the special judge granting the divorce was not in conformity with the statute. The Court concluded that "the allegations of [the] petition were sufficient to confer jurisdiction." The Court also found that nothing "on the record show [ed] that the election of the Special Judge was not in all respects in conformity to the governing statutes." The Court concluded, "[w]hile it is true that the minute entry recites a conclusion only, this recital precludes collateral attack." *Id.*, 167 S.W.2d at 354.

Gentry, 924 S.W.2d at 680-81.

Gentry also discussed *Gordon v. Pollard*, 336 S.W.2d 25 (Tenn. 1960) and *Overby v. Overby*, 457 S.W.2d 851 (Tenn. 1970). The challenge to the divorce decree in *Gordon* pertained to the court's jurisdiction over the parties. *Gordon* was a personal injury action wherein the plaintiff was a passenger in a vehicle operated by the defendant. At the time of the accident, the plaintiff and defendant were married; however, the marriage was subsequently annulled. In her personal injury action, the plaintiff asserted that the marriage was void because they had obtained a marriage license by misrepresenting their ages. However, the *Gordon* court concluded that although the marriage may have been voidable, it was not void.

In *Overby*, the Court found a judgment awarding child support void because the trial court did not have jurisdiction over the defendant, who was not before the court either by service of process or by appearance. The Court concluded "[t]hat a judgment in personam against a defendant

who is not before the court either by service of process or by the entry of appearance is void. . . ." *Overby*, 457 S.W.2d at 852 (citing *Dickson v. Simpson*, 113 S.W.2d 1190 (Tenn. 1938); *Terrell v. Terrell*, 241 S.W.2d 411 (Tenn. 1951)). That decision, however, does not support the attack on the divorce decree in this case, where both parties were before the Court.

After analyzing the foregoing cases, the Supreme Court in *Gentry* concluded these cases recognize that "where the court has general jurisdiction of the subject matter and jurisdiction over the parties, and where the court's decree of divorce is not 'wholly outside of the pleadings,' a divorce decree will not be deemed void." *Gentry*, 924 S.W.2d at 681. The *Gentry* court went on to conclude that "absent such a prima facie void decree, a flaw in procedure will not render a decree void"; therefore, the *Gentry* divorce decree was not void and not subject to collateral attack. *Id*.

The record before this Court does not contain the 2001 Final Decree of Divorce or the Permanent Parenting Plan under attack. Accordingly, we have not been afforded the opportunity to examine the "face" of the order at issue and, therefore, have no basis upon which to conclude that it is "facially" invalid.[10] Moreover, the record does not establish that the court that entered the 2001 Final Decree of Divorce lacked general jurisdiction of the subject matter, ruled on an issue wholly outside of the pleadings, or lacked jurisdiction over Mother, the party complaining. To the contrary, the record, incomplete as it is, establishes that the trial court obviously had general jurisdiction of the subject matter, a suit for divorce; the decree awarding the divorce was not outside the pleadings, it was the specific relief sought; and, the court had jurisdiction over the parties. Accordingly, we affirm the trial court's finding upholding the validity of the 2001 Final Decree of Divorce, along with the Permanent Parent Plan and the award of child support stated therein.

RETROACTIVE APPLICATION OF CHILD SUPPORT

Having affirmed the trial court's decision not to void the April 2001 order, the retroactive application of Father's child support obligation may only date back to the date on which Mother filed the Petition.

> Any order for child support shall be a judgment entitled to be enforced as any other judgment of a court of this state, and shall be entitled to full faith and credit in this state and in any other state. *Such judgment shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification*

[10] Mother contends the child support in the 2001 Decree deviated from the child support guidelines and therefore, she contends, it should be declared void. Providing a written explanation for a deviation from the child support guidelines is of critical importance, *see Berryhill v. Rhodes*, 21 S.W.3d 188, 193 (Tenn. 2000); however, failure of a trial court to do so will not operate to void a final order. Mother also contends she spent the greater amount of time with the child and was unlawfully required to pay child support to Father, relying on *Gray v. Gray*, 78 S.W.3d 881 (Tenn. 2002), which provides that "only the parent who spends the greater amount of time with the child should be awarded child support. . . ." *Gray*, 78 S.W.3d at 884. We find no merit to this argument because *Gray* was filed subsequent to the 2001 Decree at issue and it does not operate to make prior decrees void *ab initio*.

is filed and notice of the action has been mailed to the last known address of the opposing parties.

Tenn. Code Ann. § 36-5-101(f)(1) (emphasis added).

The trial court made the child support award retroactive to February 1, 2005, the month in which Mother filed her Petition. Father does not challenge the effective date of the award.[11] We, therefore, affirm the award of child support retroactive to February 1, 2005.

ATTORNEY FEES

Mother sought and was denied her attorney's fees in this matter. She argues on appeal that Father's failure to pay child support is the reason the parties are in court, and she is thus entitled to her attorney's fees. This court "will not interfere with the trial court's decision awarding attorney fees except where there is a clear showing that the trial court reached the wrong conclusion, with a result that manifest injustice would be done if the award is allowed to stand." *Brown v. Brown*, 2005 WL 3447685, at *5 (Tenn. Ct. App. Dec. 14, 2005) (citing *Long v. Long*, 957 S.W.2d 825, 829 (Tenn. Ct. App.1997)). There being no indication that the trial court reached the wrong result, we affirm the trial court's denial of Mother's request for attorney's fees.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Appellant, Sherri Annette Cook.

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FRANK G. CLEMENT, JR., JUDGE

[11] Father did not challenge whether the retroactive date should be February 24, 2005, when Mother filed the petition at issue, or February 1, 2005, the date set by the court.